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IN THE

Supreme Court of the United States

October Term, 1965

No. 339

STELLA HUGHES,
Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington, in its Cause, No. 37583, entered in the above entitled case on January 20, 1966, published in the official Advance Sheets of that Court as 67 Wn. Dec.(2d) No. 17, 787; 410 P.2d. 20 and printed in Appendix J hereto, pp. 59. Petition for rehearing was denied on April 14, 1966, without opinion, and the remittitur of the Supreme Court of the State of Washington was sent down to the trial court on said date and is printed in Appendix L hereto, pp. 94.

Citations to Opinions Below

The opinion of the trial court, the Superior Court of the State of Washington in and for Pacific County, in its Cause No. 14546, is unreported, but printed in Appendix E hereto, pp. 19.

The opinion of the Supreme Court of the State of Washington is not yet published in the permanent volumes of that court, but it is printed in Appendix J hereto, pp. 59, and is printed in the official Advance Sheets of the court as 67 Wn. Dec. (2d), No. 17, 787, and in 410 P.(2d) 20.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). The decision of the Supreme Court of the State of Washington was filed and entered on January 20, 1966, (Appendix J hereto, pp. 59). A timely petition for rehearing was filed and was denied on April 14, 1966, (Appendix K hereto, pp. 93). Rule 50 of Rules on Appeal of the Supreme Court of the State of Washington[1] provides that the filing

[1]Rule 50, Rules on Appeal of the State of Washington, R.C.W. Vol. O, Rules on Appeal, provides: "Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally deeermined."

of such petition suspends the decision of the court until the cause is finally determined. The Supreme Court of the State of Washington filed its remittitur on April 14, 1966, and same was sent down to the trial court on that date, Appendix L hereto, pp. 94.

Questions Presented

The petitioner, Stella Hughes, is the owner of real property bordering the Pacific Ocean and deraigns her title from a United States patent issued prior to the admission of the State of Washington to the United States. Imperceptible accretion has occurred on the westerly or ocean side of her property and, claiming right and title thereto under the United States and its patent, she sought to quiet title against adverse claims of the State of Washington to the accreted land. The question presented is, accordingly, as follows:

1. Whether the location and method of ascertaining the boundary of petitioner's real property bordering the Pacific Ocean, to which title is deraigned from a United States patent issued prior to the admission of the State of Washington to the Union, is a matter governed by federal law and the decisions of this court by which law and decisions the State of Washington is bound.

Constitutional Provisions and Statutes

No statute as such is involved in this matter, simply "the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." **Borax Consolidated, Ltd. v. City of Los Angeles,** 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9.

The Fifth and Fourteenth Amendements to the United States Constitution are involved to the extent that if the decision of the Supreme Court of the State of Washington is permitted to stand, the petitioner will have been deprived of her property without due process of law, it will have been taken by the state without just compensation, and she will have been denied equal protection of the law.

The Fifth Amendment provides in part as follows:

> " . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution provides in part as follows:

> " . . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

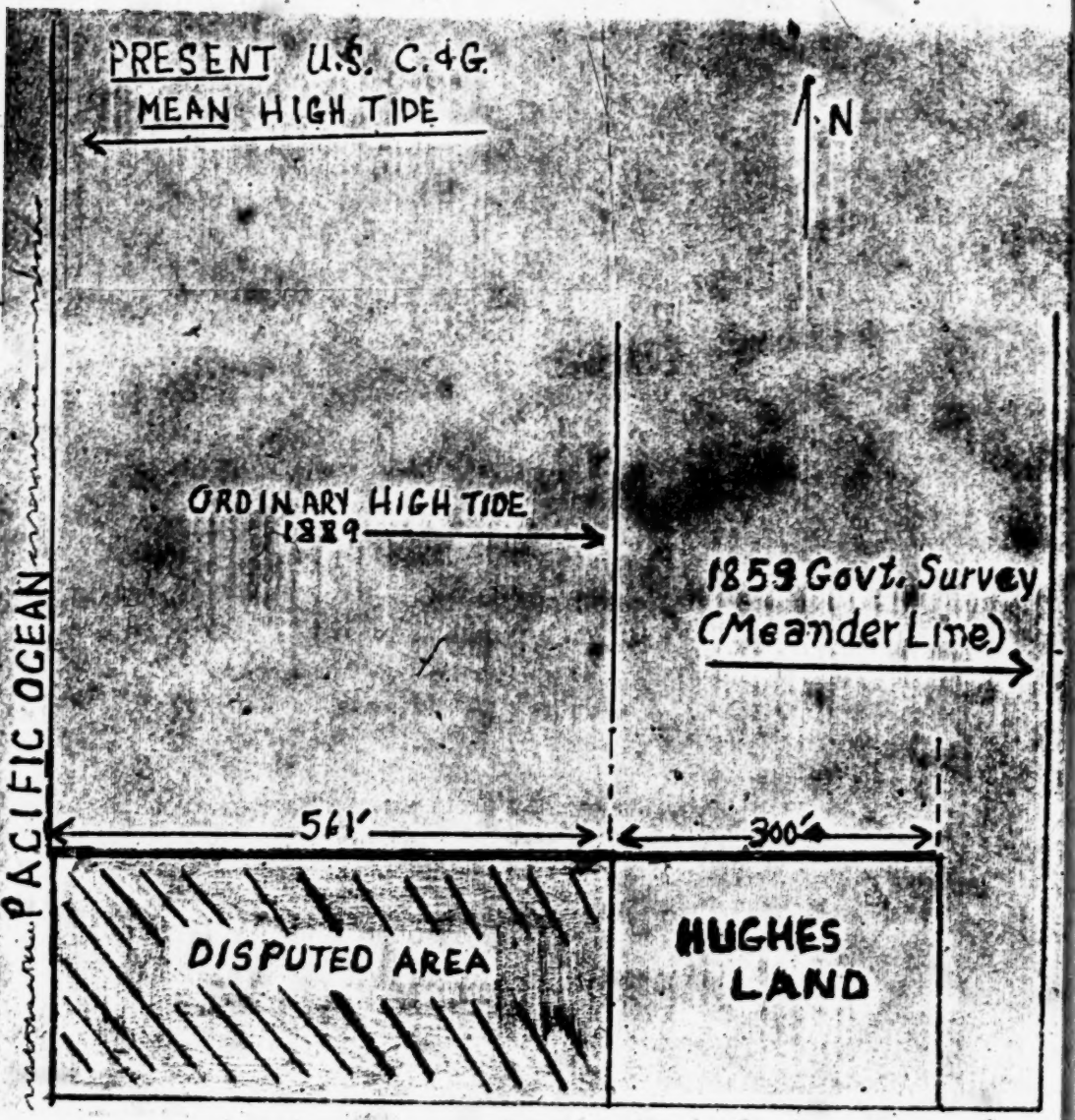
This action was brought in the Superior Court of the State of Washington in and for Pacific County by petitioner as plaintiff against the State of Washington. She is the owner of lands in that county extending to and bordering the Pacific Ocean. She deraigns her title from the United States Government by virtue of a patent issued prior to the State of Washington becoming a state of the Union. Imperceptible accretions have occurred to her lands to the west and she, as upland owner, believes and asserts that she continues to own her land to the Pacific Ocean, including any gradual accretions which have occurred over the years by reason of the natural forces of nature. The State of Washington, on the other hand, lays claim to the gradual accretions to the land of Mrs. Hughes occurring since statehood in 1889, and attempts to establish a new ownership between the property of the petitioner and the ocean.

Paragraph 2 of the complaint (Appendix A, pp. 5, 6) states the position of the petitioner:

> "Title to the above described real property was originally obtained from the United States government prior to 1889 and the westerly boundary line of said property is a line corresponding to the line of mean high tide of the Pacific Ocean, and defendant State of Washington claims some right, title or interest easterly of said west bound-

ary line but any such claim on the part of the State of Washington is inferior to the right of plaintiff herein."

The State of Washington, in its answer and cross complaint (Appendix B pp 10, 11) denied that this was the dividing line and alleges that the common and federal law had been changed by local court decisions, administrative construction and legislative action and contended that the boundary line is a line of ordinary high tide as of November 11, 1889 (the date of statehood) and that such line is permanent and unchanging. The conflicting contentions of the parties and the substantial depth of the disputed property is depicted by the following compiled map.


PRESENT U.S. C.&G.
MEAN HIGH TIDE
N
ORDINARY HIGH TIDE
1889
1859 Govt. Survey
(Meander Line)
PACIFIC OCEAN
561'
300'
DISPUTED AREA
HUGHES
LAND

Thus, a controlling federal question was first raised by the pleadings.

The case was heard on admitted facts and exhibits consisting of certain superior court decisions and maps subject to objections as to relevancy (Appendix F pp. 21). The trial court was advised of and recognized the federal question at the outset of the trial (Appendix F pp. 21, 24).

> "MR. WELSH: . . . . . This is a representative case among many. Each of these cases, as well as the one at present . . . the original title was acquired by plaintiff or predecessor in interest prior to 1889 from the United States government.
>
> "THE COURT: Prior to statehood?
>
> "MR. WELSH: Prior to statehood.
>
> "THE COURT: As a patent from the United States government?
>
> "MR. WELSH: Yes."

Counsel for the State of Washington also recognized the existence of a controlling federal question at the outset (Appendix F, pp. 21, 26)).

> "MR. HARTINGER: The court of appeals has decided the state law must be disregarded and that federal law as developed by the federal court must be applied. Basicly this is our issue."

At the conclusion of the trial the trial court de-

cided in favor of the petitioner and dealt with the federal question as follows (Appendix F, pp. 21, 33):

> "Whether the state law does apply or whether Federal Law should be applied. I just don't see any escape from the decision in the **Borax Consolidated v. Los Angeles** case in 296 U.S. 10. This is a 1935 case where 28 years ago the opinion was written by Chief Justice Charles Evans Hughes and the Ninth Circuit Court of Appeals decision in United States vs. the State of Washington in 1961, 26 years later, where the decision was written by Justice Hamley, who was formerly a member of the Supreme Court of the State of Washington, that is, the 294 F. (2d) 830 case. I think those cases decide specifically the question that is involved here. The Borax case, now 28 years old, hasn't been departed from that I can find. And the Sampson Johns case, the Ninth Circuit case in '61, was a Federal Case. He was a resident of the State. The State has a lawyer, who for many years felt that the Washington rule — the local law — should be applied. The Circuit Court reversed him and specifically held against the position of the State on both phases of the question. In the Borax case Justice Hughes said — this was quoted in the Sampson Johns' case — 'Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect

> of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.'"

The trial court entered judgment for petitioner describing and quieting title to her land as follows (Appendix E., pp. 19):

> "The western boundary of which is the line of mean high tides of the Pacific Ocean as it now or hereafter may exist, which line is the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years, free and clear of any right, title, claim or interest of the State of Washington to any lands accreted to the original donation land claim either prior or subsequent to November 11, 1889."

Respondent appealed from the judgment to the Supreme Court of the State of Washington. The State of Washington in its brief on appeal filed in the State Supreme Court (Appendix G, pp. 38, 40) recognized the controlling federal question as determined by the trial court as follows:

> " . . . but nevertheless felt compelled by the federal court decisions to establish the boundary solely as a matter of federal judgemade law simply because title to Mrs. Hughes' property can be traced back to a federal patent issued prior to statehood."

On appeal to the State Supreme Court, petitioner, in her answering brief, argued for the application of federal law as follows (Appendix H, pp. 50, 51):

"ARGUMENT IN SUPPORT OF JUDGMENT. The lower court was impelled to follow the decisions in Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10 (1935) and U.S. v. State of Washington 294 Fed. 2d 830, (9th Circuit 1961) Certiorari denied. The opinion in this latter case was written by Judge Hamley, a former member of this state's supreme court who on page 2 of his opinion said:

"'Declining to be bound in its determination by the definition of the term "ordinary high water mark" under California law, the Court said:

"'"The question as to the extent of this federal grant, that is, as to the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law."'" (Citing cases.)

Respondent, State of Washington, in its reply brief (Appendix I, pp. 54, 55) restates the question involved:

"BORAX, LTD. V. LOS ANGELES AND UNITED STATES V. WASHINGTON DO NOT NULLIFY STATE REAL PROPERTY LAW

Mrs. Hughes contends that this court is compelled to affirm the judgment of the court below on authority of Borax Ltd. v. Los Angeles and United States v. Washington without regard to state law, be it statute or judicial decision. The state disputes this contention."

The Supreme Court of the State of Washington reversed the lower court and said (Appendix J, pp. 59, 81):

"In the instant case plaintiff's (respondent's) argument in support of judgment of the trial court orbits around three decisions: **Borax Consol. Ltd. v. Los Angeles** 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935), **Ghione v. State,** 26 Wn. 2d 635, 175 P. 2d 955 (1946) and **United States v. Washington,** 294 F.2d 830 (9th Cir. 1961). It was apparently the third decision which triggered this action.

"We do not find the three cases apposite. **Borax, supra,** establishes the rule that mean high tide (the average height of all high waters through a complete tidal cycle) is the criterion for 'ordinary high water'. The case does not involve the question of accretion. ..... We do not question the federal government's right over its own property, but the rules applied by the United States Court of Appeals do not override the established rules of the property of the sovereign state in a controversy between it and one of its citizens."

Oral argument in the Supreme Court of the State of Washington was heard **en banc,** and the dissenting pinion states (Appendix J, pp. 59, 84):

"Hill, J. (dissenting) — I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read **and understand** point in the opposite direction, so I am compelled to dissent.

"We must decide whether the westerly (seaward) boundary of Stella Hughes' property is the present mean high tide line, or whether it is the line of ordinary high tide as the state of Washington computes it to have been on November 11, 1889. It is as really as simple as that.

"Signpost 1: Location of plaintiff's westerly (seaward) boundary is a federal question.

"The plaintiff traces her title to a federal patent issued before Washington became a state. This court recognized a long time ago the right of federal courts to ascertain the limit of federal grants. See **Washougal & LaCamas Transp. Co. v. Dalles, P. & A. Nav. Co.**, 27 Wash. 490, 496, 68 Pac. 74 (1902). In **Borax Consol., Ltd. v. Los Angeles**, 296 U.S. 10, 80 L. Ed. 9, 56 Sup. Ct. 23 (1935), it was stated that when a federal patent is involved, the boundary between upland and tideland is necessarily a federal question. True, no accretions were involved, but it seems unlikely that this would have made any difference as to whether federal law should be applied.

"Signpost 2: Federal law being applicable, the 'shifting boundary theory' applies.

"If federal law is applicable, then **United States v. Washington**, 294 F.2d 830 (9th Cir. 1961), cert. den. 369 U.S. 817 (1962), is decisive. That case holds that imperceptible accretions go with the uplands whenever title to the uplands is derived from the United States."

The majority decision and opinion of the Washington Supreme Court was to the effect that the imperceptible accretions occurring after statehood became the property of the state and not of the upland owner, either because it felt the federal property rules in such cases were not apposite or could not serve to override the concept of the Washington State Su-

preme Court as to what the established rules of property should be in such situation.

After the rendition of its decision by the Supreme Court of the State of Washington, petitioner filed a petition for rehearing again posed the federal question, which was denied on April 14, 1966, (Appendix K, pp. 93), and on the same date the remittitur was sent down (Appendix L, pp. 94).

The petitioner now timely seeks redress in this court by this petition.

Reasons For Granting The Writ

1. Rule 19 of this court sets forth an important, if not controlling, reason for the granting of a writ in such a case as this in the following language:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The Supreme Court of the State of Washington has held that imperceptible accretions occurring with respect to land owned by one who deraigns her title from a federal patent may be taken from that owner and a new ownership set up between her and the waters of the Pacific Ocean to which point the federal patent extended at the time of its issuance. But this

court held in **Borax Consol., Ltd. v. City of Los Angeles, 296** U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9, that imperceptible accretions of this type are the property of the upland owner. The Ninth Circuit Court of Appeals in **United States v. The State of Washington**, 294 F.2d 830, 9th Cir. (1961), confronting essentially the same question that is here involved, felt the **Borax Consolidated** case to be controlling and held that imperceptible accretions occurring along the Washington coast belonged to the upland owners. The Supreme Court of the State of Washington, as long ago as 1902, in **Washougal & LaCamas Transportation Co. v. Dalles, Portland and Astoria Navigation Co.**, 27 Wash. 490, 68 Pac. 74, recognized that whatever title or right passes under a grant of lands by the United States is a federal question and "the judgment of a state supreme court thereon is within the appellate jurisdiction of the federal supreme court. **Shively v. Bowlby,** 152 U.S. 1 (14 Sup. Ct. 548)." Thus, we now have the Washington Supreme Court in this case determining a substantial federal question in a way probably not in accord with applicable decisions of this court. This is a situation which justifies a final and definitive decision on the matter by the Supreme Court of the United States.

2. This very question has remained unsettled for over 75 years. It was thought that the careful de-

cision of Judge Hamley of the Court of Appeals for the Ninth Circuit in **U.S. v. Washington, supra,** would finally and fairly set to rest the problem of boundaries along the Pacific Coast where the changing forces of nature produce accretion and erosion with respect to coastal lands. Now, unless this court grants certiorari and determines the matter, a situation would exist in which the State of Washington will pursue a course of taking and establishing its ownership and new ownerships in lands which this court, the federal courts and the common law have always held are owned by those who acquired the lands through a patent issued prior to statehood. The physical result will be a checkerboard pattern of ocean boundaries, some extending to mean high tide line of 1889, others to the present line of mean high tide, depending on date of acquisition and the court in which the litigant finds himself. Hundreds of separate ownerships, individual and municipal, miles of coastline as well as tidal water boundaries, are now questionable. Only confusion, dissatisfaction and controversy can arise from such a state of conflicting decisional law. This court should finally dispose of the matter by granting certiorari and determining this matter one way or another, once and for all.

3. To permit the decision of the Washington State Supreme Court to stand without review by this

court, if it be an erroneous decision and contrary to applicable federal and common law as contended, would be to permit the State of Washington to deprive this petitioner and other private citizens similarly situated of their property without due process of law; it would deny them the equal protection of the law, and would deprive them of their property without just compensation, all contrary to the Constitution of the United States.

Petitioner recognizes that this court is not interested in granting a petition simply because a state court may have committed an error in arriving at its decision. However, in this case, if federal law be controlling as petitioner contends and as the decisions of this court seem to indicate, then to permit the erroneous decision of the Washington Supreme Court to remain in effect has grave constitutional consequences which this court should not tolerate. The petitioner and others similarly situated, in reliance upon a right derived from the United States itself, have acquired and paid for property bordering the Pacific Ocean. This was the purpose for its acquisition. Natural forces over the years, which no man controls, have caused accretion of that property. The ocean border has moved westerly. It could just as easily have moved easterly, and the owners risked the loss of their property after it was purchased. Now, years later, the

State of Washington, contrary to the decisions of this Court and of the federal courts interpreting United States patents, and contrary to the common law, has decided to take the accreted property for its own use without compensation, setting up a new ownership between the upland owner and the ocean, to which the original property extended. If the Supreme Court of the State of Washington, in setting up that new ownership, is acting mistakenly and improperly, whether in good faith or not, its action undeniably produces the result of depriving these people of their property without just compensation, without due process of law, and of denying them equal protection of the laws. Such a wrong, whether unintentional or not, is a constitutional wrong which should be redressed by this court.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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